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DISTRICT OF UTAH

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UNITED STATES DISTRICT COURT
 DISTRICT OF UTAH

KARRIE KEITH,

Plaintiff,

v.

MICHAEL ASTRUE
 CURRENT COMMISSIONER
 OF THE SOCIAL SECURITY
 ADMINISTRATION,

Defendant,

CIVIL ACTION NO.
 2:06-cv-907

ORDER

On October 25, 2006, Plaintiff appealed the Commissioner's decision denying her application for disability insurance benefits under the Social Security Act. After the case had been fully briefed, this court heard oral arguments on May 4, 2007. Having now fully heard the case, the court enters the following order remanding to the Commissioner for further proceedings.

Plaintiff presented two issues for consideration. (1) Whether the ALJ properly considered the medical opinion evidence, including the evidence from Mrs. Keith's treating physician, and (2) whether the ALJ properly rejected the testimony of Mrs.

Keith. Because the court finds that a remand is appropriate under the first issue, the second issue is not considered in this order.

FACTS

Plaintiff, Mrs. Keith, suffered an injury to her low back on June 4, 2001 while sorting clothing for her employer. She has not worked substantially since this injury. (T. 14). She was initially diagnosed with a lumbar strain and returned to modified work with an order for physical therapy. (T. 174). However, she continued to have pain and an MRI revealed that she had a broad based disc bulge at L4-5 with a free disc fragment causing central canal stenosis. (T. 185). Mrs. Keith then began seeing Dr. Alan Brown. Dr. Brown found that Mrs. Keith had a positive straight leg test and mild weakness in the right L3-4 muscle group and took her off work. (T. 226). Dr. Brown began treatment with medications and a series of epidural injections. However, these modalities did not bring significant pain relief.

At the recommendation of Dr. Brown, Mrs. Keith decided to undergo a surgical fusion at L4-5 and L5-S1, which was done on January 9, 2002. (T. 205). Post surgically Mrs. Keith continued to complain of a fair amount of pain. (T. 218). Following surgery Dr. Brown gave her an 18% whole person impairment rating using the Utah Labor Commissions guides. (T.215). Mrs. Keith continued to have severe pain so in January of 2004 Dr. Brown recommended a discogram to evaluate a possible failed fusion. (T. 288). The discogram, performed by Dr. Charles Bova on January 21, 2004, revealed no pain response at L2-3, the control disc, but positive severe pain response at L3-4 and L4-5. Mrs. Keith also had a pain response with entry into the intervertebral space. *Id.* Dr. Brown saw Mrs. Keith on January 27, 2004, and after reviewing the discogram,

concluded that she could not return to work. (T.287). He also expressed approval of her application for Social Security Disability. *Id.* To support his conclusion that Mrs. Keith should not work Dr. Brown provided a narrative statement discussing Mrs. Keith's current medical condition and her resulting limitations. (T. 285). Dr. Brown continued to treat Mrs. Keith with other modalities including removal of the bone stimulator, (T. 338), and increases in pain medication. (T. 336).

On July 29, 2004, Mrs. Sharon Marchant, P.T., evaluated Mrs. Keith's functional capacity in a functional capacity examination. (T. 353-60). Mrs. Marchant reported that Plaintiff considered herself unable to meet the physical demands of sedentary work, but that the results of her evaluation showed an ability to meet the demands of light work. (T.360). Mrs. Marchant found that Plaintiff demonstrated various inconsistencies throughout during the evaluation and suggested symptom magnification. (T.360). She also concluded that Plaintiff could do more at times than she currently states or perceives. *Id.* On August 9, 2004, Mrs. Keith was evaluated by Dr. Richard Knoebel. Dr. Knoebel found that Mrs. Keith was hypersensitive over her left SI joint and surgical scar and had decreased range of motion of her lumbar spine, she had normal reflexes, no muscle spasms, and no muscle atrophy. (T. 367). He also found her subjective complaints far outweighed the objective findings in the face of the inconsistencies on physical examination and numerous inappropriate responses to credibility testing. (T.365-67). Dr. Knoebel concluded that Mrs. Keith could lift 35lbs occasionally and 20lbs frequently, and therefore could perform medium work. (T. 369).

Dr. Brown continued to treat Mrs. Keith through the end of 2004 and throughout 2005. On December 13, 2005, Dr. Brown provided a statement of the specific limitations

resulting from Mrs. Keith's low back pain. (T. 323). These limitations included most significantly for the current case; walking a couple of blocks without rest, alternating sitting and standing, unscheduled breaks at least once per hour, lifting no more than 10lbs, and missing work 3-4 times per month. *Id.* Dr. Brown specifically noted that her impairment is consistent with her symptoms and functional limitations. *Id.*

A hearing was held on February 14, 2006, in Salt Lake City Utah before an Administrative Law Judge. (T. 12). The ALJ issued a decision finding Mrs. Keith not disabled on April 28, 2006. At the hearing the ALJ received into evidence the opinions of two vocational experts, one in a written report and the other as sworn testimony. The vocational expert called by the ALJ to testify at the hearing testified that Mrs. Keith would not be able to sustain employment with her need for breaks or with her need for absences. (T. 422). The written report also stated that Mrs. Keith would not be able to work if she needed unscheduled breaks or would miss more than 4 days of work each month. (T. 142).

However, the ALJ found that Mrs. Keith statements concerning the severity of her symptoms were not entirely credible (T.16) and therefore found that Mrs. Keith had the residual functional capacity to perform a significant range of sedentary work with the option to sit and stand at will, occasionally can climb ramps and stairs and balance, kneel and crawl, do little if any stooping and crouching, and never climb ladders, ropes or scaffold. (T. 15). The ALJ did not include any limitations regarding the need for breaks or absences, nor did the ALJ include a discussion of why those limitations were not included in the residual functional capacity finding. Based upon the residual functional

capacity finding the ALJ did make, the ALJ concluded that other work was reasonable available to Mrs. Keith and therefore she was not disabled. (T.23-25).

STANDARD FOR REVIEW

The court reviews the Commissioner's decision to determine whether substantial evidence in the record as a whole supports the factual findings and whether the correct legal standards were applied. *Winfrey v Chatter* 92 F.3rd 1017, 1019 10th Circuit 1996.

DISCUSSION

Mrs. Keith argues that the ALJ erred by failing to discuss the two critical limitations of needing extra breaks and missing work. The core of her argument rests on the ALJ's failure to discuss these limitations in any way in her decision. This argument is based on the fact the ALJ appears to have adopted the limitations as stated by her treating physician, Dr. Brown, but completely failed to discuss the limitations of needing extra breaks or absences as part of her limitations in the decision.

The law of the 10th Circuit requires that this court remand a case where the ALJ fails to provide specific legitimate reasons for rejecting the opinion of a treating source. *Watkins v Barnhart* 350 F. 3rd 1297, 1301 (10th Circuit 2003). In evaluating treating source opinions, the ALJ is required to follow a two step process. *Id.* The first step in the process is to decide if the treating physician should be given controlling weight. *Watkins*, 350 F.3rd 300. Social Security Ruling 96-2p establishes a two step sequential process for determining whether a treating physician's opinion should be given controlling weight. First, the ALJ must determine whether the treating physician opinion is well supported by acceptable clinical and laboratory diagnostic techniques. Second, the ALJ must confirm that the opinion is consistent with other substantial evidence in the record. *Id.*

Mrs. Keith's arguments here do not depend on an analysis of whether the ALJ properly decided whether Dr. Brown's opinion should be given controlling weight. Rather, her arguments focus on the second step of the process which requires that the ALJ weigh the various medical opinions according to several factors provided in the regulations at 20CFR Sec 404.1527. *Watkins* 350 F.3rd 1300. After considering these factors, the ALJ must provide good reason in the decision for the weight he gives the treating physician's opinion. If the ALJ fails to explain what weight is given to the testimony and the reasons for giving that weight, the reviewing court is required to remand the case because the court can not provide a meaningful review. *Id.*

In the present case the ALJ failed to evaluate the treating physician opinions as required by *Watkins*. This is a fairly narrow error on the part of the ALJ because it is a failure to evaluate only two of the limitations assessed by the treating physician. Those limitations are Mrs. Keith's need for extra breaks during a work day and her need for extra absences of at least 4 per month. Notably, the ALJ concluded that Mrs. Keith's symptoms and limitations could reasonably be produced by her medical conditions but that she was not found entirely credible. (T. 16). However, the ALJ failed to discuss why these two particular limitations were not acceptable even though she essentially adopted the remainder of Dr. Brown's opinion. The ALJ references the contradictory opinions of Dr. Knoebel and Ms. Marchant but obviously did not adopt them as they provided for functional abilities far in excess of those found by the ALJ. Thus, it is apparent that the ALJ did not correctly evaluate Dr. Brown's opinion regarding missing work and the need for extra absences was not accepted despite being uncontradicted. Under the weighing approach required by *Watkins* the ALJ should have provided an analysis of the weight

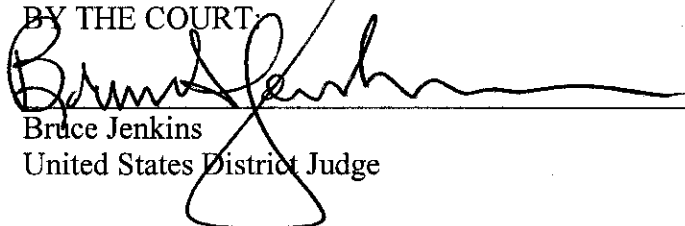
given to the various medical opinions as well as the reasons for rejecting the parts of Dr. Brown's opinion she apparently did not accept. Therefore, this case will be remanded to allow the ALJ the opportunity to fully evaluate Dr. Brown's opinion, especially the two limitations regarding missing work and Mrs. Keith's need for extra breaks.

CONCLUSION

Based upon the foregoing the court concludes that the ALJ erred in failing to properly evaluate Dr. Brown's opinion. This case is therefore reversed and remanded to the commissioner for further proceedings to allow the ALJ to fully evaluate Dr. Brown's opinion.

DATED this 8th day of June 2007.

BY THE COURT:


Bruce Jenkins
United States District Judge